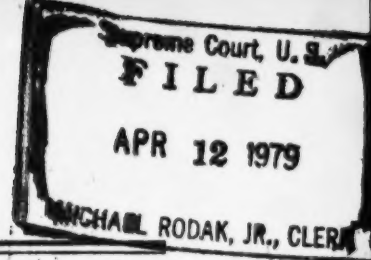


78-1550



IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____

MORGAN THOMAS PETITIONER

VS:

COMMONWEALTH OF KENTUCKY..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI

BLAKE PAGE
Fifth Floor-McEldowney Building
Winchester, Kentucky 40391

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____

MORGAN THOMAS PETITIONER

VS:

COMMONWEALTH OF KENTUCKY..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

This is a case where the Commonwealth of Kentucky through its Constitution and Rules of Appellate procedure opened the avenues of appeal, and guaranteed each citizen one appeal. The unified court system of that state violated Petitioner's rights under the 14th Amendment of the United States Constitution by dismissing his right to appeal by arbitrary and capricious requirement not to be found in their Court adopted rules.

OPINIONS IN THE COURT BELOW

At the trial of petitioner's case for theft by taking his motion for directed verdict at the conclusion of the Commonwealth's case for failure to sustain the

burden of proof was overruled, as was his same motion at the conclusion of the petitioner's proof.

A Notice of Appeal was filed (See Appendix page 3a). This was followed by a timely Designation of the Record on Appeal which necessarily designated the transcript of the evidence, as the grounds for appeal were all based upon the lack of evidence to (1) permit the case be given to the jury, and (2) lack of evidence to support the verdict. (See Appendix pages 4a-5a).

In compliance with the Kentucky Rules of Civil Procedure, Rule 73.08 (Which is also used in Criminal Appeals, as are all Civil Rules of procedure in Kentucky) within the 60 day period permitted a motion was made in the trial court for an extension of 60 days more within which to provide the official Court Reporter with time to complete the transcript. (See Appendix pages 6a-7a).

The trial court sustained this motion and entered Order for said extension. (See Appendix page 8a).

As the end of the second 60 day period approached it became apparent that due to the heavy appellate load she was under she could not deliver the transcript, to which fact she later filed an affidavit. (See Appendix page 9a).

Due to the limited time of the trial court's extension of 60 days, April 6th 1978 being the final date, a motion drafted under Civil Rule 73.08 was hand delivered to the office of the Court of Appeals in

Frankfort, Kentucky by a secretary, where our copy was stamped as "FILED, COURT OF APPEALS April 6, 1978." (See Appendix pages 10a-11a).

The following day, April 7, 1978, the Court of Appeals Clerk's office called requesting a certified copy of the trial court judgment and notice of appeal. Although we could not comprehend why this was required we drove 200 miles to obtain these specific pleadings and sent them on to the Court of Appeals. The Clerk for some reason then submitted the Motion to the Court evidently marked "FILED April 12th, 1978, and the court entered an Order dismissing petitioner's appeal. (See Appendix pages 12a-13a).

Petitioner filed a Motion to reconsider, (See Appendix pages 14a-16a) and the Court promptly overruled same. (See Appendix page 17a).

Petitioner then filed under Civil Rule 76.20 for a discretionary review by the Kentucky Supreme Court, which was also overruled, See Appendix pages 18a-21a, 22a).

We then moved the court for permission to file this Petition for Writ of Certiorari and continuing petitioner on bail. This motion was sustained by order. (See Appendix pages 23a). Their mandate was stayed.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT INVOKED

The grounds upon which the jurisdiction of the Supreme Court is invoked is that a state, being the Commonwealth of Kentucky has violated the Fourteenth Amendment of the Constitution of the United States by guaranteeing all citizens of the Commonwealth one appeal, in Section 115 of its Constitution, providing Rules of Appellate Procedure, then denying the petitioner this right by arbitrarily and capriciously dismissing his appeal, although petitioner followed said rules to the letter.

The dates of the Orders sought to be reviewed are:

1. Order dismissing Appeal — May 8th 1978
2. Order overruling Motion to Reconsider June 9th 1978
3. Order overruling Motion for Discretionary review by Supreme Court of Kentucky November 14th 1978.
4. Order staying Mandate pending application for a writ of Certiorari to the United States Supreme Court, granting 90 days. Entered January 12th 1979.

The statutory provision conferring jurisdiction is the Fourteenth Amendment to the Constitution of the United States, and Rules of the Supreme Court of the United States, Rule 19 (1) (a).

QUESTIONS PRESENTED

PRIME QUESTION

When petitioner explicitly follows the written, published Rules of Procedure adopted by the state courts in filing for an extension of time to certify the record, including the transcript of evidence, and the state has in its Constitution granted one right of appeal and his Motion for Extension was stamped by the Clerk of the Court of Appeals as "FILED" within the time permitted, does the state violate the Fourteenth Amendment to the U.S. Constitution by dismissing that one right of appeal?

SUBSIDIARY QUESTION

When petitioner has relied upon the grounds for his appeal that the evidence entitled him to a directed verdict which was overruled and that the evidence did not support the verdict, does the State Court of Appeals violate his 14th Amendment rights by denying him time to receive his transcript of such evidence when the official Court Reporter has informed the appellate court that she cannot finish same without an extension of time, when petitioner has moved the court by motion under Kentucky Civil Rule 73.08, upon the grounds that a copy of the judgment of the trial court and notice of appeal was not filed with the motion, when such rule does not mention these need be filed?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE

1. The United States Constitution, 14th Amendment.
2. Kentucky Constitution Section #115. (See Appendix page 29a)
3. Kentucky Civil Rules 73.08 (See Appendix pages 24a-25a)
4. Kentucky Civil Rules 76.34 - Motions, Requirements. (See Appendix pages 27a-28a)
5. Kentucky Rule Requiring Certified copy of judgment and notice of appeal, being a rule for immediate relief in Appellate Court to prevent irreparable damage, such as injunctions and restraining orders, certainly not applicable to motions for extension of time. (See Appendix pages 24a-25a)

STATEMENT OF CASE AND FACTS

The petitioner, Morgan Thomas was tried by the Breathitt Circuit Court of Kentucky by a jury on December 12, 1977. Petitioner moved at the close of the case for the prosecution for a directed verdict for failure to carry the burden of proof, and likewise at the close of petitioner's case. Both were overruled.

Notice of Appeal was timely filed as was the designation of the record including the transcript of evidence.

Petitioner was exercising his right of appeal guaranteed by Section 115 of the Kentucky Constitution.

The official court reporter designated by the unified court system, by affidavit stated that due to case load in her judicial district of three counties, being one of the heaviest criminal case loads in the state, combined with the fact that this was a poverty area and the public defenders were appealing every case, she could not provide the transcript within the time allotted. She stated that it would take 60 more days, and when petitioner's 120 days would have expired, she would not have started yet.

Petitioner had until April 6th, 1978 to move the Court of Appeals for an extension which mandated in his case an inclusion of the transcript of evidence.

On April 6, 1978 a motion was hand carried to the office of Clerk of the Kentucky Court of Appeals and was offered in accordance with the terms of Civil Rule 73.08. The Clerk stamped petitioner's copy FILED APRIL 6, 1978.

The following day, the Clerk's office called for a certified copy of the judgment of the trial court and of the notice of appeal, although Civil Rule 73.08 makes no mention of this. The only other rule that does in the Kentucky Rules of Procedure is Civil Rule 76.33 which concerns only those seeking injunctions and restraining orders within the appellate court.

Although counsel was puzzled, he complied with the Clerk's request and drove 200 miles to obtain the superfluous pleadings and tendered them to the Clerk's office, who evidently marked them filed April 12th 1978, which was past the extension period.

The Court of Appeals dismissed the appeal upon the grounds that the motion for extension was not timely filed.

Petitioner moved the court to reconsider only to have this overruled. Petitioner then moved the Kentucky Supreme Court for discretionary review, yet this was also overruled. Then a motion was made to stay the mandate for a period to petition for a writ of certiorari to this court. This was granted by order for 90 days from January 12, 1979.

ATTEMPT TO RAISE FEDERAL QUESTION

Petitioner attempted to raise the question that his rights were violated under the Fourteenth Amendment by the Court misinterpreting its own rule as to the filing for extensions in its Motion to Reconsider, and his motion for discretionary review.

ARGUMENT

In the case of *Dryden v. Commonwealth*, 435 SW2d 457, decided, December 13, 1968 it was held at page 459:

"An arbitrary dismissal or denial of an appeal is equally offensive to the rights guaranteed by the 14th Amendment, and by the Kentucky Constitution whether it results from an erroneous conclusion as to jurisdiction or from some other improper reason."

In the present case it is obvious from the facts that the Clerk of the Court of Appeals of Kentucky erroneously in receiving the petitioner's Motion for Extension of Time in which to Certify the Record (including the evidentiary transcript) misinterpreted the proper Kentucky Civil Rule (which also apply in Kentucky to criminal appeals).

Civil Rule 73.08 speaks plainly and unequivocally of and may be, within the Court's discretion, be granted if made by Motion within the proper time. The requirements for such motion made under Rule 73.08 are set out in Civil Rule 76.34 entitled Motions. (See Appendix pages 27a-28a). It can be readily seen that no where does it appear that a certified copy of the Judgment, nor notice of appeal is required to be filed.

We respectfully request that this court note that in the Appendix at pages 26a-28a a copy of page 98 of the Rules is set out.

If the Court will notice, immediately above the proper rule, appears Rule 76.33, captioned INTERMEDIATE RELIEF IN APPELLATE COURT. This rule clearly shows in (1) applies to "intermediate relief, which may be granted ex parte upon a satisfactory showing that otherwise he will suffer immediate and irreparable injury before a hearing may be had on the motion. That section (2) of this Rule does require that unless the record on appeal has been transmitted to the appellate court, a motion for interlocutory relief *will not be docketed* (Our italics) for consideration until the movant has filed, or caused to be filed as authorized by Rule 75.10, the judgment or order from which the appeal was taken, the notice of appeal, and such portions of the record as may be necessary for a decision on the motion.

It is obvious that the Supreme Court of Kentucky in its adoption of the new Civil Rules, effective January 1st, 1978 did not intend for the requirements in Rule 76.33 to apply to a Motion under Rule 73.08 for an Extension of Time or they would have either incorporated these requirements in Rule 73.08, or at least referred to another Rule that did require them. There is no way that a comparison can be logically made between a motion to extend time within which to file or certify a record, and the type relief afforded in Rule 76.33 that refers to injunctions and restraints.

The Kentucky appellate courts have stated a policy of strict compliance many times, and if this demanded of petitioner, then he is entitled to strict compliance in the court's following its own rules with which he must comply and making them clear enough to follow.

Since petitioner's case was before the Kentucky courts they have by opinion and order recognized this principle in the case of *Louisville Memorial Gardens v. Commonwealth, Dept. of Transportation*, rendered by the Kentucky Supreme Court March 16th, 1979 _____ SW2d _____ (Not yet published). In that case the court encountered a problem of a late filed brief. The Court admitted that confusion had arisen after the multitude of changes in the Rules of January 1st 1978. Further that in two different Rules the time for filing a brief was "tucked" away in another rule.

Chief Justice Palmore in the opinion stated:

"It has been and still is the policy of this court to be rather strict in the enforcement of time requirements prescribed by the rules of procedure. Nevertheless, we recognize that the number and frequency of rules changes occasioned by the recent restructuring of the judicial system was bound to create a certain amount of confusion and disorientation on the part of both lawyers and court personnel, some of which can be held as excusable without compromising that principle. In this instance

we are disposed to hold counsel's error excusable. The fault is partly our own, in that the substance of CR 76.20 (9) (b) should have been either included or referred to in CR 76.12 (2). A rules amendment to accomplish that purpose will be issued in due course.

Our case is much stronger than the case just quoted wherein error was made by counsel. In our case the wrong rule was surely referred to by the Clerk. In our case the rule is clear, Rule 73.08 clearly in regard to extension of time — Rule 76.33 clearly to interlocutory relief of some nature in the appellate court, two entirely different types of judicial procedure.

We submit sincerely that it is obvious by now to see what happened in our case. With the one rule (the wrong one) on top of the page, and the proper rule immediately under it can be seen that evidently the clerk, or a member of his staff, opened the page and read the wrong rule, the one which required the certified copy of the judgment and notice of appeal. This is the only way we can explain why our copy of the Motion is stamped by him on April 6, 1978 (timely) while he held up docketing the Motion erroneously believing that the judgment and notice of appeal had to be in his office before he docketed it. Through our Motion to Reconsider, and our Motion for discretionary review we attempted to point this out to the courts but were summarily overruled. The United States Supreme Court must now give us back our rights under the 14th Amendment.

We do emphatically say, not through flattery but through fact that the mistake of the Clerk or his staff because of the proximity of the two rules could be easily made. We feel we must add that through long years of personal relationship and contact with the incumbent Clerk and his staff they are sincere, dedicated persons, and have been of great service to counsel and other attorneys of our state, yet to err is human. This they did, and this court must grant a Writ of Certiorari to correct the deprivation of petitioner's rights under the 14th Amendment to the United States Constitution to his one appeal which he lost through no fault of his own.

WHEREFORE, petitioner prays the United States Supreme Court to grant him a Writ of Certiorari upon this important question.

Respectfully submitted,

BLAKE PAGE
Fifth Floor-McEldowney Building
Winchester, Kentucky 40391

APPENDIX

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1a

BREATHITT CIRCUIT COURT

**COMMONWEALTH OF
KENTUCKY,**

PLAINTIFF,

-VS-

Indictment No. 1935

MORGAN THOMAS

DEFENDANT

JUDGMENT

**On a Charge of Theft by Unlawful
Taking (KRS 514.030)**

**Convicted of Theft
(KRS 514.030)**

* * * * *

After having been convicted by a jury, or upon a plea of "Guilty", the defendant, in person with his counsel was this day brought into Court; the pre-sentencing report having been filed and reviewed by the Court as required by law, and the defendant being asked if he had any legal cause to show why judgment should not be pronounced against him; upon advice of counsel, none being shown, it is adjudged that the defendant stands convicted and the defendant, being over eighteen (18) years of age, shall be taken by the Sheriff of Breathitt County to the jail of Breathitt County and from there by the Sheriff of said County transferred to the custody of the Department of Corrections at such location as the Department shall designate by regulation and there to remain in their

custody for a period of two (2) year(s). This sentence shall run (concurrently) (consecutively) with the sentence(s) of Indictment No. N/A of this Court. (If not applicable, write "NA above).

/s/ J. Douglas Graham
J. DOUGLAS GRAHAM, JUDGE
BREATHITT CIRCUIT COURT

This Judgment prepared by the Office
of the Commonwealth's Attorney,
39th Judicial District

/s/ A. Dale Bryant

I, Ollie James Moore, Clerk of the Breathitt Circuit Court, do hereby certify that the above and foregoing Judgment is a true and correct copy as the same appears of record and on file in my said office.

This the 7th. day of April, 1978.

/s/ Ollie J. Moore CLERK
BREATHITT CIRCUIT COURT

* * * * *

Filed 12-14-77
Ollie J. Moore, Clerk
By: /s/ Glenda Strong, D.C.

BREATHITT CIRCUIT COURT
COMMONWEALTH OF
KENTUCKY
VS: NOTICE OF APPEAL No.
MORGAN THOMAS

Comes now the defendant and appeals the judgment of this Court to the Kentucky Court of Appeals.

/s/ Blake Page
Blake Page
Counsel for Defendant

I certify a copy of the
foregoing has been served
upon the Commonwealth Attorney.

Breathitt Circuit Clerk

* * * * *

BREATHITT CIRCUIT COURT**COMMONWEALTH OF
KENTUCKY****VS:****MORGAN THOMAS****DEFENDANT****Designation of Record on Appeal**

.....

Comes the defendant and designates the following
to constitute the record on appeal:

1. The warrant.
2. The indictment.
3. The arraignment.
4. All motions made by defendant throughout the
trial other than those appearing in the official
transcript of evidence.
5. The transcript of evidence excluding the
opening statements but including the closing
statement.

/s/ Blake Page**Blake Page****Counsel for Defendant****Morgan Thomas****Fifth Floor-McEldowney Bldg.,****Winchester, Kentucky 40391****Telephone: 744-7743**

I certify that a copy of the foregoing has been
mailed to Honorable A. Dale Bryant, Jackson,
Kentucky 41339; Honorable Robert Stephens,
Attorney General, Commonwealth of Kentucky,
Capitol Bldg., Frankfort, Kentucky 40601, this 19th
day of December, 1977.

/s/ Blake Page**Counsel for Defendant**

* * * * *

BREATHITT CIRCUIT COURT

COMMONWEALTH OF
KENTUCKY

PLAINTIFF

VS:

MORGAN THOMAS

DEFENDANT

Motion for Extension of Time
to File Record

.....

Comes the defendant and states that the original sixty (60) days in which to file this record is expiring and it appears that the record will not be available with the transcript until after said expiration; that the defendant moves the Court for an extension of time of sixty days as provided by Civil Rules within which to file said record in the Court of Appeals and set a date to and including April 6, 1978 for said filing; this motion having been made within the original sixty days as required by the Rules.

/s/ Blake Page

Blake Page

Fifth Floor-McEldowney Bldg.

Winchester, Kentucky 40391

Telephone: 606-744-7743

Counsel for Defendant

I certify that a true copy of the foregoing Motion has been served upon Honorable A. Dale Bryant,

Commonwealth's attorney, by mailing said copy this 3rd day of February, 1978, to his office address at Jackson, Kentucky.

/s/ Blake Page

Counsel for Defendant

* * * * *

BREATHITT CIRCUIT COURT

COMMONWEALTH OF
KENTUCKY

PLAINTIFF

VS:

MORGAN THOMAS

DEFENDANT

ORDER

This cause coming on to be heard for an extension of time, and it appearing that the Court record is not completed at this time; the defendant's Motion for an Extension to have time in which to file his record being properly made before the expiration of the original sixty days;

It is now CONSIDERED, ORDERED and ADJUDGED that defendant is granted the relief requested; that his Motion is sustained and he shall be granted an extension of time in which to file the record with the Court of Appeals on or before April 6, 1978.

This 7 day of February, 1978.

/s/ J. Douglas Graham

JUDGE, BREATHITT CIRCUIT COURT

SEEN BY:

/s/ A.D.B.

Commonwealth's Attorney

TO BE ENTERED:

/s/ Blake Page

Counsel for Defendant

* * * * *

KENTUCKY COURT OF APPEALS

MORGAN THOMAS

APPELLANT

VS

COMMONWEALTH OF KENTUCKY APPELLEE

The affiant being duly sworn says that she is the official Court Reporter for the Breathitt Circuit Court; that due to the heavy case load including special terms and the amount of appeals both by private counsel and public defenders office, the affiant has been unable to complete the transcript of evidence in this case and will need 60 days to and including the 6th day of June, 1978 to file said transcript, so that the record may be complete.

This affidavit is given to show cause why said transcript has not been completed and said extension needed.

I have read the foregoing statements herein and they are true as I verily believe.

/s/ Elsie G. Miller

Subscribed and sworn to before me by Elsie G. Miller this 7th day of April, 1978. My Commission Expires: October 29, 1978.

/s/ Sallie Siler

Notary Public

Kentucky State at Large

* * * * *

FILED
APR 6 1978
JOHN C. SCOTT
CLERK
COURT OF APPEALS

KENTUCKY COURT OF APPEALS

COMMONWEALTH OF
KENTUCKY

PLAINTIFF

VS:

MORGAN THOMAS

DEFENDANT

Motion on Appeal from Breathitt Circuit Court

** ** ** ** ** ** **

Comes the appellant, Morgan Thomas, and moves the Court of Appeals for an extension of time to and including the 6th day of May, 1978, to file the Statement of Appeal and the record herein; that this appellant has not received the transcript from the Court Reporter of the Breathitt Circuit Court and appellant is unable to draft and complete the statement of appeal.

WHEREFORE, appellant prays for Judgment of the Court upon this his Motion.

/s/ Blake Page

Blake Page

Fifth Floor-McEldowney Bldg.,

Winchester, Kentucky 40391

Counsel for Appellant

I certify that a true copy of the foregoing Motion has been mailed to the Commonwealth's attorney, Honorable A. Dale Bryant, Jackson, Kentucky this 6th day of April, 1978, and by delivering a copy to Honorable Robert Stephens, Attorney General, Commonwealth of Kentucky at his office in the Capitol Building, Frankfort, Kentucky this 6th day of April, 1978.

/s/ Blake Page

Counsel for Appellant

* * * * *

COMMONWEALTH OF KENTUCKY**COURT OF APPEALS**

NO. 78-CA-383-I

MORGAN THOMAS APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT
COURT NO. 1985COMMONWEALTH OF
KENTUCKY

APPELLEE

ORDERBEFORE: HOWERTON, LESTER, and WHITE,
JUDGES

The Court, having considered the motion for an extension of time to and including May 6, 1978, to "file appellant's statement of appeal and the record," which is treated as a motion for an extension of time to certify the record, and being otherwise sufficiently advised, ORDERS that the motion be and is hereby DENIED. The Breathitt Circuit Court granted appellant an extension to and including April 6, 1978, to have the record on appeal "filed." Appellant's present motion, filed on April 12, 1978, for an extension of time to certify the record was, therefore, not timely. CR 73.08. The appeal is hereby DISMISSED for failure to timely perfect.

ENTERED: May 8, 1978

/s/ Charles B. Lester
JUDGE, COURT OF APPEALS

* * * * *

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 78-CA-383-1

MORGAN THOMAS APPELLANT

VS: APPEAL FROM BREATHITT CIRCUIT
COURT NO. 1985

COMMONWEALTH OF
KENTUCKY APPELLEE

MOTION TO REHEAR

* * * * *

Comes the defendant, Morgan Thomas, on receipt of the Order of May 8, 1978, denying further extension of time within which to file record and dismissing his Appeal for failure to timely perfect and moves the Court to rehear this Motion upon the following grounds:

1. That said record was taken by Mrs. Sallie Siler, Secretary for the office of Page, Clay & Thomas, counsel for defendant to Frankfort to the office of the Clerk of the Court of Appeals on April 6, 1978.

2. That the record was accepted by Ms. Connie Bray and Mrs. Siler was informed that same would be marked "Filed".

3. That later it was discovered that although the Judgment of the Breathitt Circuit Court was

Certified, the Notice of Appeal was not and this office was informed of this and told that same should be forwarded at once. Whereupon, the Clerk of the Breathitt Circuit Court was called and same was done.

4. That at the same time Mrs. Siler carried the Motion and copies of the Judgment to the Kentucky Court of Appeals office, as part of her duties she also filed a set a Articles of Incorporation of Clint Creek Coal Company, Inc., in the office of Honorable Drexel R. Davis, Secretary of State, which Articles were stamped and recorded "April 6, 1978", a copy of which is attached hereto and made a part hereof.

5. That the substance of CR73.08 was complied with on April 6, 1978.

WHEREFORE, the defendant, in view of these circumstances, moves the Court of Appeals to re-examine the record and grant the extension to June 6, 1978 as originally prayed and as filed in the office of the Clerk of the Court of Appeals on April 6, 1978, and not to deprive this defendant of his right of Appeal.

/s/ Blake Page

Blake Page

Fifth Floor-McEldowney Building

Winchester, Kentucky 40391

Counsel for Defendant-Appellant

Telephone: 606-744-7743

I certify that a true copy of the foregoing has been served upon Honorable A. Dale Bryant, Commonwealth's Attorney, Jackson, Kentucky 41339; Honorable Robert Stephens, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601 by mailing copies to their respective offices this 9th day of May, 1978.

/s/ Blake Page
Counsel for Defendant-Appellant

* * * * *

**COMMONWEALTH OF KENTUCKY
COURT OF APPEALS**

NO. 78-CA-383-I

MORGAN THOMAS APPELLANT
v. APPEAL FROM BREATHITT CIRCUIT
COURT NO. 1985

COMMONWEALTH OF KENTUCKY APPELLEE

**ORDER DENYING MOTION TO RECONSIDER
BEFORE: MARTIN, CHIEF JUDGE, REYNOLDS
and WINTERSHEIMER, JUDGES**

The Court, having considered the motion to rehear which is treated as a motion to reconsider an order of this Court dated May 8, 1978, which denied a motion for an extension of time to certify the record and which also dismissed the appeal, and being otherwise sufficiently advised, ORDERS that the motion be and is hereby DENIED.

ENTERED: June 9, 1978

/s/ Boyce F. Martin, Jr.
CHIEF JUDGE, COURT OF APPEALS

* * * * *

**IN THE SUPREME COURT
COMMONWEALTH OF KENTUCKY**

MORGAN THOMAS

**VS: MOTION FOR DISCRETIONARY
 REVIEW OF ORDER OF
 COURT OF APPEALS**

COMMONWEALTH OF KENTUCKY RESPONDENT

1. The Movant is Morgan Thomas whose counsel is Blake Page, Fifth Floor McEldowney Building, Winchester, Kentucky 40391.

2. Respondent is the Commonwealth of Kentucky, whose counsel is Hon. Robert Stephens, Attorney General, Commonwealth of Kentucky Capitol Building, Frankfort, Kentucky.

3. The Order of the Court of Appeals sought to be reviewed was entered on May 8th 1978, and the motion to reconsider that order was denied by order dated June 9, 1978, dismissing movant's appeal.

4. Movant is now free on bail.

5. The facts are that a motion for the extension of time within which to certify the record to the Court of Appeals was made on April 6th 1978 in the office of the Clerk of The Court of Appeals, as movant was wholly unable to secure the transcript

of evidence necessary for the appeal; that said motion (and nothing else) to be filed within the period of any trial court extension; that a certified copy of the Judgment and Notice of Appeal as well as an affidavit from the Court Stenographer and costs were filed later. The Court of Appeals dismissed the criminal appeal of the movant and denied a motion to reconsider.

6. The question of law involved in this motion is simply whether or not in a criminal appeal wherein it is shown that it was impossible to procure the transcript of the evidence within the 120 days allotted to defendant, and where the Civil Rule 73.08 requires a "motion" to be filed within the 120 days, and remains silent as to any other requirements, when said motion is filed within the 120 days, does the denial of further extension of time by the Court of Appeals constitute and unconstitutional denial of the one appeal required by Kentucky Constitution Section 115?

7. This order should be reviewed by the Supreme Court of Kentucky for the following reasons:

a. This Court is cognizant of the problems that have existed attempting to obtain records on appeal which has resulted in amending the Civil Rules to become effective July 1st 1978, as to Rules CR75.07(5); CR 76.04 and CR 76.12 (2) (a).

b. The placing the burden of "fighting" for the records upon appellant is now unreasonable, unrealistic and repugnant to the Unified Court System wherein the Clerks are under direct control of the said unified system.

c. Movant is aware that the courts may by reasonable rules, and reasonable application thereof deny an appeal, yet this denial must be based upon strong and reasonable grounds. We ask this review as we feel that the denial under the facts of this case violates movants constitutional right to appeal under both the Kentucky and federal constitutions.

WHEREFORE, movant prays the Court to review the said orders of the Court of Appeals.

/s/ Blake Page
 BLAKE PAGE
 COUNSEL FOR MOVANT
 FIFTH FLOOR -McELDOWNEY BLDG.
 WINCHESTER, KENTUCKY 40391
 TELEPHONE 606-744-7743

CERTIFICATE

I, Blake Page, counsel for Movant certify that a copy of the foregoing Motion for Discretionary review was served upon Hon. John Scott, Clerk of the Court of Appeal, and Hon. Robert F. Stephens

Attorney General, by delivering a copy thereof to their respective offices in Frankfort, Kentucky this 29th day of June, 1978.

/s/ Blake Page
 COUNSEL FOR MOVANT

* * * * *

SUPREME COURT OF KENTUCKY

78-SC-333-D

(78-CA-383-J)

MORGAN THOMAS

MOVANT

V. BREATHITT CIRCUIT COURT

1985

COMMONWEALTH OF
KENTUCKY

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion of Morgan Thomas for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

Entered November 14, 1978.

/s/ John S. Palmore
Chief Justice

* * * * *

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 78-CA-383-I

MORGAN THOMAS

MOVANT

v. APPEAL FROM BREATHITT CIRCUIT

COURT ACTION NO. 1985

COMMONWEALTH OF
KENTUCKY

RESPONDENT

ORDER

BEFORE: PARK, REYNOLDS, AND WILHOIT,
JUDGES, SITTING DECEMBER 28,
1978.

Movant requests this Court to stay the mandate in this action pending the filing of an application for a writ of certiorari to the United States Supreme Court. The motion is hereby GRANTED for a period of 90 days from this date, there being no objection by the Commonwealth. It is further ORDERED that the bond which the movant is currently under is approved as security. CR 76.44(b); 28 U.S.C. § 2101(f).

ENTERED: January 12, 1979.

/s/ Anthony M. Wilhoit
JUDGE, COURT OF APPEALS

* * * * *

Rule 73.08**Certification of Record on Appeal**

The record on appeal as constituted under Rule 75 or Rule 76 shall be prepared and certified by the clerk of the court from which the appeal is taken within 60 days after the date of filing the notice of appeal except that when more than one appeal is taken from the same judgment the court from which the appeal is taken may prescribe the time for certification, which shall be not less than 60 days after the date on which the first notice of appeal was filed. In all cases the court from which the appeal is taken may in its discretion, with or without motion or notice, extend the time for certifying the record on appeal, if its order for extension is made before the expiration of the period for certification as originally prescribed or as extended by a previous order, but shall not extend the time to a day more than 120 days after the date on which the first notice of appeal was filed. The appellate court in its discretion may upon motion and showing of good cause extend the time for certification of the record on appeal if the motion for extension is made before the expiration of the period as originally prescribed or as extended by a previous order.

(Adopted October 14, 1977, effective January 1, 1978.)

Author's Comment**2. Amendment**

The 1976 amendment to this Rule, merely substitutes the words "appellate court" for the words "Court of Appeals" wherever they appeared and the words "trial court" for the words "circuit court" wherever they appeared. This is to reflect that the Rule is also applicable to appeals taken from the district court to the circuit court, which can also be an appellate court under the new judicial article, when it reviews judgments of a district court. See CR 1, Comment 1.5 for a general discussion of the new judicial article, as implemented.

The 1978 amendments to the Civil Rules amended this Rule to reflect the fact that the record on appeal is to be *certified* to the appellate court, rather than filed therein, within the 60-day period, subject to extension. See CR 75. The comments in the main volume are generally applicable, but they must be read in light of these amendments.

Kentucky Decisions**I. Strict compliance required**

Sound principles of judicial administration require that procedural rules relating to appeals are to be obeyed and time limits observed. *Williams v. Payne*, Ky., 515 S.W.2d 618.

* * * * *

Rule 76.33
APPEALS

Rule 76.33 Intermediate Relief in Appellate Court

(1) **When Authorized.** At any time after a notice of appeal has been filed a party to the appeal may move the appellate court for intermediate relief, which may be granted ex parte upon a satisfactory showing that otherwise he will suffer immediate and irreparable injury before a hearing may be had on the motion.

(2) **Record Required.** Unless the record on appeal has been transmitted to the appellate court, a motion for intermediate relief will not be docketed for consideration until the movant has filed, or caused to be filed as authorized by Rule 75.10, the judgment or order from which the appeal was taken, the notice of appeal, and such portion of the record as may be necessary for a decision on the motion.

(3) **Costs.** Payment of the filing fee specified in Rule 76.42 (2) (a) shall be required with the motion.

(Adopted October 14, 1977, effective January 1, 1978).

Rule 76.34
Motions

(1) **Applicability of Other Rules.** Rules 5.01, 5.02, 5.03, 5.05, 6.04, 6.05 and 7.02 shall apply to

all motions other than motions for transfer to the Supreme Court and motions for discretionary review, except that the movant shall not specify a time for hearing in the motion or notice unless the time has been set as provided by paragraph (4) of this Rule 76.34.

(2) **Response.** The opposing party may file a response, accompanied by a certificate of service, within 10 days after the date the motion was served or within the time otherwise designated by the court.

(3) Hearing and Disposition.

(a) Except for motions that call for final disposition of an appeal or original action in the appellate court, any member of the court designated by the Chief Justice or Chief Judge may hear and dispose of any motion; and

(b) Any intermediate order of a procedural nature pending final disposition of a proceeding pending in an appellate court may be issued on the signature of any judge of that court.

(4) **Oral Arguments.** No motion will be heard on oral argument except by prearrangement with an authorized representative of the appellate court or with the judge to whom the motion is addressed or has been assigned.

(5) Motion to Dismiss Appeal or Cross-Appeal.

(a) In addition to any other relief provided by

these Rules, an adversary party may move to dismiss an appeal or cross-appeal because it is not within the jurisdiction of the appellate court or because it has not been prosecuted in conformity with the Rules; and

(b) Timely filing of a motion to dismiss shall suspend the running of time for procedural steps otherwise required with regard to the appeal and any cross-appeal in the same proceeding, and the time will continue to run as provided by Rule 76.12 (2) after the date an order is entered denying the motion or passing it to the merits.

(Adopted October 14, 1977, effective January 1, 1978.)

* * * * *

APPELLATE POLICY—RULE-MAKING POWER

§ 115. **Right of appeal—Procedure.**—In all cases civil and criminal, there shall be allowed as a matter of right at least one appeal to another court, except that the commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law, and the general assembly may prescribe that there shall be no appeal from that portion of a judgment dissolving a marriage. Procedural rules shall provide for expeditious and inexpensive appeals. Appeals shall be upon the record and not by trial de novo.

Compiler's Notes. The General Assembly in 1974 proposed (Acts 1974, ch. 84, §§1-3) the repeal of sections 109 to 139, 141 and 143 of the constitution and the substitution in lieu thereof new sections 109-124. This amendment was ratified by the voters at the regular election in November, 1975 and became effective January 1, 1976.

* * * * *

78-1550

Supreme Court, U. S.

FILED

MAY 25 1979

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No. 1550

MORGAN THOMAS - - - - - **Petitioner**

versus

COMMONWEALTH OF KENTUCKY - **Respondent**

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY**

ROBERT F. STEPHENS

Attorney General

Commonwealth of Kentucky

MARTIN GLAZER

Assistant Attorney General

120 State Capitol

Frankfort, Kentucky 40601

Of Counsel for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

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MORGAN THOMAS - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

May it please the Court:

OPINIONS BELOW

(Set out in Petition.)

JURISDICTION

(Set out in Petition.)

QUESTION PRESENTED

Whether the dismissal of an appeal in the state court pursuant to rules of that court constitute a violation of the Fourteenth Amendment, the due process clause of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS

FOURTEENTH AMENDMENT, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner originally appealed his conviction for Theft by Taking in the Breathitt Circuit Court of Kentucky to the Kentucky Court of Appeals by filing a timely Notice of Appeal. He requested additional time to file his record on appeal, and the Breathitt Circuit Court granted an extension to the 6th day of April, 1978. On that date, he sought an enlargement of time within which to certify the record. This motion was filed in the Kentucky Court of Appeals. The Clerk of the Kentucky Court of Appeals declined to accept the motion because it was not accompanied by *certified* copies of the trial judgment of conviction and the notice of appeal. Further, he failed to file certified copies of the order of the trial court granting his extension of time to certify the record. Petitioner finally corrected this deficiency by filing certified copies of the necessary papers on April 12, 1978, which was six

days after the extension of time granted to him by the trial court to certify the record.

Based upon this late filing of the proper motion together with certified papers, the Kentucky Court of Appeals dismissed his appeal as untimely perfected. He moved that Court to reconsider its dismissal order which was refused.

Petitioner then filed a motion for discretionary review in the Supreme Court of Kentucky (similar to a petition for writ of certiorari in this Court) which was denied by the Supreme Court of Kentucky on November 14, 1978. He then requested the Kentucky Court of Appeals to stay its mandate for ninety days from January 12, 1979, pending an application for a writ of certiorari to the United States Supreme Court which was granted. That ninety day period expired April 12, 1979. Respondent has no record that any motion for additional stays of the mandate of the Kentucky Court of Appeals was filed subsequent to the original stay either in that court or this one. So, the original order dismissing petitioner's appeal is now final.

His present petition for a writ of certiorari was filed April 12, 1979 (although copy was not received by respondent until April 30, 1979).

ARGUMENT AND REASONS FOR DENYING THE WRIT

Petitioner contends that the Kentucky Court of Appeals' dismissal of his appeal violated his Fourteenth Amendment right under the Constitution of the United States to his *state* right of appeal.

First of all, there is no *federal* constitutional right to a state appellate review of a state criminal conviction. *Estelle v. Dourrough*, 95 S. Ct. 1173, 420 U. S. 534, 43 L. Ed. 2d 377; rehearing denied 95 S. Ct. 1589, 421 U. S. 921, 43 L. Ed. 2d 790, on remand 512 F. 2d 1061 (U.S. Texas 1975).

And even a state does not have to provide an appeal. *Ross v. Moffett*, 94 S. Ct. 2437 (U.S. N.C. 1974).

Of course, once a state provides an appeal procedure, it must apply it equally to all.

Certainly, a state may fashion rules for the proper and orderly consideration of appeals.

Even this Court has dismissed appeals to it for failure to docket a case within the time prescribed by rules of this Court. *Shapiro v. Doe*, 90 S. Ct. 641, 396 U. S. 488, 24 L. Ed. 2d 677, rehearing denied 90 S. Ct. 991, 397 U. S. 970, 25 L. Ed. 2d 264 (U.S. Conn. 1970) (Sup. Ct. Rules, rule 13).

And, Kentucky likewise may fashion rules for the orderly administration and processing of appeals before its courts, which if violated may result in dismissal of those appeals.

Kentucky Civil Rule 75.10 provides:

"If at any time before the record on appeal to the Court of Appeals or Supreme Court has been transmitted to the appellate court a party desires to move that court for a dismissal, for a stay pending appeal, for additional security on the supersedeas bond, or for any other intermediate order, the clerk of the trial court at his request shall *certify* and transmit to the appellate court whatever portion of the record is needed for that purpose." (Emphasis supplied.)

Also, Civil Rule 76.33 provides:

"(1) When Authorized. At any time after a notice of appeal has been filed a party to the appeal may move the appellate court for intermediate relief, which may be granted *ex parte* upon a satisfactory showing that otherwise he will suffer immediate and irreparable injury before a hearing may be had on the motion.

(2) Record Required. Unless the record on appeal has been transmitted to the appellate court, a motion for intermediate relief will not be docketed for consideration *until the movant has filed, or caused to be filed as authorized by Rule 75.10, the judgment or order from which the appeal was taken, the notice of appeal, and such portion of the record as may be necessary for a decision on the motion.*

(3) Costs. Payment of the filing fee specified in Rule 76.42(2)(a) shall be required with the motion." (Emphasis supplied.)

The Kentucky Rules' requirement for certified copies of appropriate papers accompanying a motion is a reasonable and practical requirement. Inasmuch as the appellate court does not have a trial record before it, before it is filed, the court needs authentic, certified copies of appropriate portions of the trial record in order to dispose of motions for intermediate relief.

Here, the petitioner (appellant in the state court) moved for additional time in the appellate court to certify and prepare the record for appeal. Not having the record before it, the appellate court needed the certified copy of the judgment, notice of appeal, and

orders granting additional time to certify the record, which papers were filed in the trial court. Without these orders and motions, the appellate court could not know if the motion before it was timely or out of time. Thus, a motion filed without these necessary papers properly certified as truly in the trial record is no motion at all. Until these were properly filed, they were not before the appellate court and when ultimately filed, they were filed *out of time* and justified the court's dismissal of the appeal.

The Constitution of the United States does not guarantee the right to have docketed an improperly filed appeal in a state court. Nor does it grant a petitioner the right to have filed an improperly filed appeal in this court.

Kentucky has the right to promulgate rules for its court system and to require adherence to those rules by those seeking to avail themselves of appellate procedure as long as those rules are impartially administered and the rules in existence are reasonable ones to accomplish an orderly procedure for appeal.

There is no proof that the Kentucky Court of Appeals is discriminating against petitioner by enforcing these rules while not enforcing them against others similarly situated.

In *Wainwright v. Sykes*, 433 U. S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977), this court set out the "contemporaneous objection" rule, that an objection must be timely made to be considered on appeal. Otherwise, the issue has been waived.

By extension that rule could apply to a contention that an appeal's dismissal violated constitutional principles. One seeking to avail himself of an appeal must properly follow the rules for appellate procedure. Without such adherence and the enforcement of such rules, appeal procedure would be not enhanced but stymied and end in a jumbled morass, which even an astute judiciary could not disentangle.

There is no federal question here; only an enforcement of state law and state court rules. Obviously, the Kentucky courts can interpret their own rules. And they have done so consistently and equally for a number of years. An example is the case of *Evans v. Commonwealth*, Ky., 450 S. W. 2d 509 (1968) (copy attached as appendix). In that case, the Kentucky court extended the time to file the record but warned in 450 S. W. 2d at 510:

"We are calling attention to the fact that hereafter we will not grant extensions of time under CR 73.08 unless the movant makes it abundantly clear that his time for filing the record has not already expired when the motion under CR 73.08 is made."

That case was decided in 1968 and there the court explained the proper procedure—that is—the movant must file certified copies of the lower court's order extending the time for filing the record to indicate that "the movant's time for filing his record has not run out."

This petitioner did not follow that requirement; his appeal was dismissed.¹

There is no federal constitutional issue presented by the petition; there is only an interpretation and application of state law and state court rules. The Kentucky courts interpreted those rules against petitioner. As long as those rules for appeal are reasonable ones and are applicable equally to all, the dismissal of an appeal in violation of those rules is a question of state law and does not rise to the level of a constitutional question reached by certiorari to this Court. The petition should be denied.

Respectfully submitted,

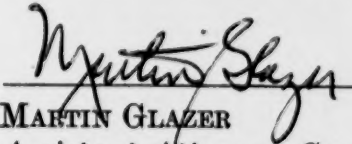
ROBERT F. STEPHENS
Attorney General
Commonwealth of Kentucky

MARTIN GLAZER
Assistant Attorney General
120 State Capitol
Frankfort, Kentucky 40601
Of Counsel for Respondent

¹We also note that petitioner continues to ignore the rules—even of this court. Although filing his petition on April 12, 1979, he did not mail three copies to respondent (Rule 33(1)). We have no notice that proof of service was filed as required by Rule 21(3). Only after calling petitioner's counsel did we receive one copy of the petition on April 30, 1979.

PROOF OF SERVICE

I, Martin Glazer, one of counsel for the Respondent, hereby certify that three (3) copies of the foregoing Brief for Respondent in Opposition to Petition for a Writ of Certiorari to the Court of Appeals of Kentucky were mailed, postage prepaid, this 24th day of May, 1979, to Honorable Blake Page, Counsel for Petitioner, Fifth Floor—McEldowney Building, Winchester, Kentucky 40391.


MARTIN GLAZER
Assistant Attorney General

APPENDIX

APPENDIX**EVANS v. COMMONWEALTH**

Cite as, Ky., 450 S. W. 2d 509

Jincie Jenette EVANS, Appellant,**v.****COMMONWEALTH of Kentucky and
Board of Claims, Appellees.**

Court of Appeals of Kentucky.

Dec. 13, 1968.

Proceeding on motion to reconsider denial of motion to extend time for filing record on appeal from an adverse judgment of the Circuit Court, Johnson County, James B. Stephenson, Special Judge. The Court of Appeals, Davis, C., held that where appellant accompanied motion to reconsider with certified copy of circuit court order of September 20, 1968 extending time for filing record to and including November 24, 1968, rule governing extension of time for filing of record was followed, and where appellant moved Court of Appeals to further extend time for filing record on November 18, 1968, on which date time for filing had not expired, court sustained motion for additional extension.

Motion for extension of time sustained.

1. Appeal and Error, Key 624

If Court of Appeals is requested to extend time for filing record on appeal, movant should demonstrate that his time for filing record has not expired by providing court with certified copy of the circuit court's order extending his time for filing record. CR 73.08, 75.10.

2. Appeal and Error, Key 505

In any appealed case in which motion is filed for new trial or amendment of judgment so as to terminate running

of time for taking appeal, record should show motion and date on which it was overruled so that Court of Appeals can be informed whether notice of appeal was in time. CR 59.01 et seq., 73.02.

3. Appeal and Error, Key 624

Where, on motion to reconsider denial of motion to extend time for filing record, appellant included certified copy of circuit court order of September 20, 1968 extending time for filing record to and including November 24, 1968, rule governing extension of time for filing of record was followed and where appellant moved Court of Appeals to further extend time for filing record on November 18, 1968, on which date time for filing had not expired, court sustained motion for additional extension. CR 73.08.

4. Appeal and Error, Key 624

Court of Appeals will not grant extension of time for filing record on appeal unless movant makes it clear that his time for filing record has not already expired when motion for extension of time is made. CR 73.08.

Robert J. Greene, Perry & Greene, Paintsville, for appellant.

E. H. Tackett, Pikeville, J. Keller Whitaker, Workmen's Compensation Bd., Frankfort, for appellees.

DAVIS, Commissioner.

On November 18, 1968, appellant filed in this court a certified copy of an adverse judgment of the Johnson Circuit Court, along with a certified copy of a notice of appeal from that judgment which was filed in the Johnson Circuit Court on July 26, 1968. These papers were accompanied by appellant's motion for an extension of time of thirty days from and after November 24, 1968, in which to file the record in this court. There was nothing in the documents filed by appellant to suggest that the circuit court had extended the time for filing the record in this court beyond the

normal sixty-day period provided in CR 73.08. Since the documents presented by appellant indicated on their face that more than sixty days had elapsed since the notice of appeal had been filed, we denied the motion to extend the time for filing record and dismissed the appeal. The appellant has now filed a motion to reconsider that ruling and has accompanied the motion with a certified copy of an order entered September 20, 1968, in the Johnson Circuit Court extending the time for filing record on appeal to and including November 24, 1968. Thus, it is now made to appear that CR 73.08 had been followed in the circuit court and that the time for filing record in this court was timely extended as permitted by CR 73.08. When appellant moved this court to further extend the time for filing record, the time for filing had not expired.

[1] Because there is an apparent misunderstanding among some members of the Bar of the meaning of CR 73.08, we are undertaking now to explain the proper practice under that rule. When this court is requested to extend the time for filing a record on appeal, as permitted by CR 73.08, the movant should demonstrate that his time for filing the record has not expired. It is a simple matter for a movant in such a case to provide this court with a certified copy of the circuit court's order extending his time for filing record, so that this court will be apprised of the fact that the movant's time for filing his record has not run out. In substance, this is a practical application of CR 75.10.

[2] A similar principle is involved in respect to CR 73.02. In any appealed case in which a motion was filed under Rule 59 so as to terminate the running of the time for taking the appeal, the record should show the motion and the date on which it was overruled so that this court can be informed whether the notice of appeal was in time.

[3, 4] We are now sustaining the motion for extension of time to file the record on appeal to and including January 6, 1969. We are calling attention to the fact that here-

after we will not grant extensions of time under CR 73.08, unless the movant makes it abundantly clear that his time for filing the record has not already expired when the motion under CR 73.08 is made.

Appellant's motion for extension of time to file record on appeal is hereby sustained, and appellant is granted to and including January 6, 1969, in which to file record on appeal.

All concur.